



How Taxis, Peanuts and Assault Rifles Get You a Martini for Dinner: Examining Peanut Quotas and Taxi Medallions in Consideration of Whether a Fifth Amendment Takings Claim is a Red Herring when Eliminating Alcohol License Quota Systems - Alcohol Licenses under a Quota System: Non-Compensable Regulatory License or Compensable Property Right in an Entrenched Legacy Market

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How Taxis, Peanuts and Assault Rifles Get You a Martini for Dinner: Examining Peanut Quotas and Taxi Medallions in Consideration of Whether a Fifth Amendment Takings Claim is a Red Herring when Eliminating Alcohol License Quota Systems

Alcohol Licenses under a Quota System: Non-Compensable Regulatory License or Compensable Property Right in an Entrenched Legacy Market

*Karen Powell**

This Article argues that allowing increased on-premise alcohol licenses will provide increased economic development through competition, without sacrificing public safety. Opponents of dismantling the on-premise quota system have consistently argued that a closed system is necessary, and may implicate a takings claim by current licensees. Review of relevant takings claim cases, including cases relating to peanut quotas and taxi medallions, however, supports opening those legacy markets by allowing new licensees into the marketplace, with little legal support for a successful takings claim relating to the value of the current licensee's license on a secondary market.

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I. INTRODUCTION

The current legacy alcohol license quota system prevents new entrants into the restaurant and tavern industry and is a disincentive to economic growth for communities due to the high cost of accessing a license to compete in a closed market. Current holders of those licenses claim that their property value in the license¹ is so great as to prevent governmental entities from allowing increased entry into the market.

More than half the states have fully accessible, and unrestricted alcohol licensing for on-premise locations, driving increased economic development without sacrificing public safety or health. However, the remaining states have not followed suit or been able to deregulate their legacy alcohol licensing systems.

This Article argues that modern business practices require changes in the regulatory system to address new market conditions. Alcohol licensing has yet to see modernization of the on-premise license structure. One of the main political and legal threats used by entrenched license holders is the takings claim against the government when there is a threat of opening the entrenched market system.

1. See Alexander Deedy, *Liquor License Capped Out: Montana at Limit Under Quota System*, HELENA INDEPENDENT RECORD (Jan. 25, 2015, 6:00 AM), available at http://helenair.com/news/local/liquor-licenses-capped-out-montana-at-limit-under-quota-system/article_e90f5928-033c-5e49-801d-b1a85935b4b1.html.

The Article argues that the current licensees' takings claim in eliminating alcohol licensing quota systems is a red herring and should not be used as a political or legal threat to prevent modernization of the system. Both the legacy license system and the results of allowing a successful takings claim are not economically optimal for society as a whole.

Without the legal threat of a takings claim, consumers can drive governmental entities to open the quota system with additional access to on-premise liquor licenses to allow more organic economic development in communities currently under extreme restrictions. Further, while there are extensive health studies relating to limiting bottle sale locations (such as liquor stores and package stores), there is little public health research, if any, for limiting restaurants and bars from entering the marketplace to sell alcohol by the glass.

What characteristics must be considered when weighing how to determine whether a government issued license is a property right, or whether it may only have a property value associated with it? When might a license be property, but yet not be a property right with a compensable takings claim attached to it?

While there is little direct legal analysis by the courts on removing or expanding the quota system and its effects on current license holders, courts have addressed similar closed licensing systems in taxi medallion licenses, peanut quota systems and game farm licenses, which provide a framework for consideration of alcohol licensing cases. Review of taxi medallion and peanut quota cases indicate that while legacy licensing systems with quotas are generally considered to provide more economic value for the licensees, there is little support for that license value to rise to a property right that can be compensable under the Fifth Amendment when a governmental entity opens the marketplace to new entrants.

This Article first reviews the history, law and economics of the current alcohol licensing quota system. Part III reviews a takings claim elements in the context of alcohol licensing. Part IV looks to parallel cases such as peanut quota systems and taxi medallion licensing. Part V discusses alcohol licensing differences from the other regulatory schemes, and finally the Article concludes with a policy discussion of the most efficient method to open a legacy alcohol license system.

II. HISTORY, LAW AND ECONOMICS OF ALCOHOL LICENSING QUOTA SYSTEMS

Alcohol has been a critical commodity and economic base since before the inception of the United States, and continues to be a driving force² in the United States economy.

The Distilled Spirits Council of the United States (“DISCUS”)³ reports that the U.S. beverage alcohol industry is a major contributor to the economy, “responsible for over \$400 billion in total U.S. economic activity in 2010, generating nearly \$90 billion in wages and over 3.9 million jobs for U.S. workers.”⁴ In 2010, “distilled spirits accounted for over \$120 billion in total economic activity, or 30% of total economic activity from all beverage alcohol.”⁵

During that same year, the beverage alcohol industry “contributed over \$21 billion directly to state and local revenues.⁶ The beverage alcohol industry’s “total contribution to state and local revenues was over \$41 billion, with \$20.1 billion coming from “indirect revenues such as corporate, personal income, property and other taxes generated by the beverage alcohol industry.”⁷ Total revenues from distilled spirits, both direct and indirect, for 2010 were “\$15.5 billion, or 37% of total beverage alcohol revenue,”⁸ leaving beer and wine with over 60% of the alcohol industry revenue.

2. Prior to passage of the Sixteenth Amendment (allowing for an income tax not apportioned by census), excise tax on alcohol provided a large percentage of the funding for the new government. With the shift to an income tax, and then the passage of the Eighteenth Amendment (Prohibition), the U.S. government’s budget no longer balanced on the alcohol industry. Now the industry provides a smaller portion of the federal budget in excise tax revenues, but is a major economic driver.

3. DISCUS is the national trade association for America’s distilling industry and represents seventy percent of all distilled spirits brands sold in the U.S. See *History of the Distilled Spirits Council*, DISCUS, <http://www.discus.org/about/history/> (last visited May 15, 2015).

4. *Economic Contributions of the Distilled Spirits Industry*, DISCUS, <http://www.discus.org/economics/> (last visited May 15, 2015) [hereinafter DISCUS Economic Contributions].

5. *Id.* DISCUS also reports that

distilled spirits are one of the highest taxed consumer products in the United States. Standardizing for alcohol content, the distilled spirits federal excise tax burden (per proof gallon) is more than double that of beer and almost triple that of wine. The federal excise tax burden per proof gallon for distilled spirits is \$13.50. In comparison, the tax burden per proof gallon for beer and wine is \$6.18 and \$4.86, respectively.

Id.

6. *Id.* “Of that amount, distilled spirits accounted for over \$8.8 billion or 41% of this direct revenue.” *Id.*

7. DISCUS Economic Contributions, *supra* note 4. According to DISCUS reports, “[f]ederal, state and local taxes accounted for \$7.83, or 54%, of the average \$14.42 price for a typical 750ml bottle of 80 proof distilled spirits in the United States in 2012.” *Id.*

8. *Id.*

What is the licensing structure that allows a consumer to easily order a martini with dinner in some states but not others?

After the Great Depression and as part of the New Deal Era regulatory framework, many cities and states implemented regulatory licensing systems using quotas based on population. Some of those regulatory areas included retail alcohol sales licenses, peanut farm quota systems, and taxi licensing systems.

While the alcohol industry is an important economic driver, the alcohol regulatory arena varies wildly by jurisdiction (either by state or in some cases, by county.) Ordering a martini requires finding an “on-premise” licensed establishment, and each jurisdiction may set differing requirements for those licenses. An on-premise license is the term used for a license that allows for retail, by the glass, sales of alcohol.

A number of jurisdictions have limited license availability, set by a quota number, to control access to the license system.⁹ These legacy quota on-premise licenses are based on census numbers by county or other local jurisdiction in the 1940s. Little, if no change, to the quota system has occurred since that time. Currently, the quota system for retail liquor sales is in place in Alaska, Arizona, California, Florida, Idaho, Kentucky,¹⁰ Massachusetts, Michigan, Minnesota, Montana,¹¹ New Jersey, New Mexico, Ohio,¹² Pennsylvania, South Dakota, Utah,¹³ and Washington, and parts of D.C.¹⁴ The quota system for on-premise licensing has created an artificial secondary market, incen-

9. See Deedy, *supra* note 1.

10. Kentucky has a quota system of one license per 2500 residents, with some licenses issued outside the quota system to address franchise growth. See Governor’s Task Force on the Study of Kentucky’s Alcoholic Beverage Control Laws, *Recommendations of the Licensing Committee*, KY.GOV 51 (Jan. 2013), available at <http://abc.ky.gov/ABC%20Task%20Force%20Report/Licensing%20Committee%20Recommendations.pdf> [hereinafter Governor’s Task Force]. In contrast, Wisconsin has a modified quota system, as of 1997, which allows for a license for every 500 residents, and also has franchise exceptions. See Budget Briefs from the Legislative Reference Bureau, *Changes in Liquor License Laws*, WISCONSIN.GOV 1 (Nov. 1997), available at <http://legis.wisconsin.gov/lrb/pubs/budbriefs/97bb12.pdf> (last visited May, 2015).

11. *Alcohol Beverage Licenses: Bars, Taverns and Restaurants*, MONTANA.GOV, https://revenue.mt.gov/home/liquor/alcoholbeverage_licenses#horizontalTab6 (last visited May 15, 2015).

12. Department of Commerce, *Liquor Control*, OHIO.GOV, <http://com.ohio.gov/liqr/about.aspx> (last visited May 15, 2015).

13. Utah Legislature Business & Labor Interim Committee, *Summary Highlights of State Imposed Alcoholic Beverage License Quota Systems*, LE.UTAH.GOV (May 16, 2012), available at http://utahlegislature.granicus.com/Viewer.php?view_id=6&clip_id=1444&meta_id=56719.

14. See Jim Saksa, *Rum Deal*, SLATE (June 12, 2014), http://www.slate.com/articles/business/moneybox/2014/06/america_s_booze_laws_worse_than_you_thought.html; see also Utah Legislature Business & Labor Interim Committee, *supra* note 13 (setting forth comparative license status for 11 western states, eight of which have a license quota system: Arizona, California, New Mexico (for liquor only), Utah, Washington, Wyoming, Idaho, and Montana).

tivizing current license holders to base the value of their business on the value of their license on a secondary market.¹⁵

The legal and economic landscape for alcohol licensing is complex and nuanced, but consumers have little patience for the byzantine system and are clamoring from access to all types of quality liquor, regardless of the regulatory structure. The shift in the United States to increasing growth of craft breweries and distilleries changed the consumer palette, and consumer expectation of being able to access spirits. In the past few years, consumer desires have driven state governments to eliminate restrictions on selling alcohol on Sundays and election days, many counties have voted to move from being dry counties to allowing sales of alcohol, and expanded tastings are available at many U.S. craft alcohol manufacturing facilities.¹⁶ The U.S. hospitality industry is on the rise, with a 2.9% growth between 2012 and 2013, with over 14 millions jobs.¹⁷

A. *Historical Significance of the Legacy On-Premise License*

How are those legacy on-premise licenses still part of the regulatory environment in so many states? The rich history of economic and social presence of alcohol in America dates back to the beginning of the U.S. government. The early federalists viewed and treated liquor as a major commodity, without the excessive restrictions that developed over time and exist today. A 1791 excise tax on distilled spirits was the first basis for funding the federal government,¹⁸ and paid off the debt of the revolutionary war. While new federalists saw liquor as a commodity that could fund the new government, the whiskey producers already saw the taxation as excessive government interference with trade; launching the armed revolt against the federal government known as the Whiskey Rebellion of 1794.¹⁹

Fiscal support of the federal government through taxation of spirits continued through the civil war. According to the *International Encyclopedia of Alcohol and Temperance in Modern History*, from the time frame of the "Whiskey Ring frauds (1869-1875) to the period of World

15. Saksa, *supra* note 14.

16. *Distilled Spirits Council 2013 Industry Review*, DISCUS 5 (Feb. 4, 2014), available at http://www.discus.org/assets/1/7/Distilled_Spirits_Industry_Briefing_Feb_4_2014.pdf [hereinafter *Distilled Spirits Council*]; see also Morgan Smith, *Alcohol Distribution Laws Bottle Up Options for Consumers and Retailers*, GEORGIA PUBLIC POLICY FOUNDATION (Oct. 16, 2002), <http://www.georgiapolicy.org/alcohol-distribution-laws-bottle-up-options-for-consumers-and-retailers/>.

17. *Distilled Spirits Council*, *supra* note 16, at 2.

18. United States Dep't. of Treas. Alcohol & Tobacco Tax & Trade Bureau, *The TTB Story*, TTB.GOV (May 16, 2012), <http://www.ttb.gov/about/history.shtml>.

19. *Id.*

War One, liquor taxes generated between 20 and 40 percent of federal revenue annually.”²⁰

The move towards major restriction of alcohol sales began in the early 1900s with state prohibition laws. In 1913, the passage of the Webb-Kenyon Act,²¹ a federal statute that barred interstate shipments of liquor that violated laws of dry states, was the first federal endorsement of the prohibition movement. Economic issues relating to the First World War also drove Congress to “shut down the distillery industry, while President Woodrow Wilson cut grain allotments to breweries and ordered the alcohol content of beer to be reduced to 2.75%.”²² Further, upon ratification of the Sixteenth Amendment²³ in 1913, which allowed the federal government to develop an income tax system that did not have to be proportionally rationed to states based on population, the federal government was no longer reliant on the alcohol excise tax for a large portion of its budget funds.

The Women’s Temperance Movement gained traction, and on December 18, 1917, Congress passed the Eighteenth Amendment to the U.S Constitution, which outlawed the transport and sale of alcoholic beverages,²⁴ and the states quickly ratified the Amendment.

During the following thirteen years of the Prohibition Era, the federal government endured extremely high liquor enforcement costs, no tax revenue from liquor, and increasingly severe economic disaster.

20. 1 ALCOHOL AND TEMPERANCE IN MODERN HISTORY: AN INTERNATIONAL ENCYCLOPEDIA 230 (Jack S. Blocker, Jr., David M. Fahey, & Ian Tyrell eds. 2003).

21. 27 U.S.C. § 122 (2015) (originally enacted in 1913 and reenacted with identical language in 1935).

22. 2 ALCOHOL AND TEMPERANCE IN MODERN HISTORY: AN INTERNATIONAL ENCYCLOPEDIA 440 (Jack S. Blocker, Jr., David M. Fahey, & Ian Tyrell eds. 2003).

23. The Sixteenth Amendment states “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.” U.S. CONST. amend. XVI. The Sixteenth Amendment was passed and ratified by the states in response to the Supreme Court’s decision in *Pollack v. Farmers’ Land & Trust Co.*, 157 U.S. 429 (1895), in which the Supreme Court declared certain taxes on income a direct taxes that were not apportioned as required under the Constitution, and thus unconstitutional.

24. The Eighteenth Amendment read, in relevant part, “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.” U.S. CONST. amend. XVIII (repealed 1933). The Eighteenth Amendment, and the Volstead Act, which was the enabling legislation, effectively established a national prohibition of alcoholic beverages by making the production, transportation and sale of alcohol illegal. It did not, however, make the consumption of alcohol illegal. During the time of prohibition, the country saw a major increase in organized crime, corrupt law enforcement, and public sentiment that violation of the laws as morally and socially acceptable. For example, New York City had over 30,000 speakeasies (illegal bars) during the time of prohibition. See *Teaching With Documents: The Volstead Act and Related Prohibition Documents*, ARCHIVE.GOV, <http://www.archives.gov/education/lessons/volstead-act/> (last visited May 15, 2015).

President Roosevelt²⁵ ran, in part, on abolishing the Eighteenth Amendment, and won. One of his early legislative actions was signing a bill legalizing the sale and manufacturing of alcohol, prior to the passage of the Twenty-First Amendment. After thirteen tumultuous years, Congress passed the Twenty-First Amendment, repealing the Eighteenth Amendment. Particularly relevant to this article, the Twenty-First Amendment states:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.²⁶

After ratification of the Twenty-First Amendment, the states were given sweeping authority to regulate alcohol²⁷ within their borders, and states enacted a variety of frameworks to address liquor production, sale and distribution. Many jurisdictions enacted a three-tier system of control, designed to prevent vertical integration of the market. Specifically, the system required manufacturing, distribution and retail sales of alcoholic beverages to be under separate ownership.²⁸ As long as those regulations set in-state and out-of-state companies on the same footing, the regulations have generally withstood the test of time.²⁹

25. Of note, while President Roosevelt pushed through the Twenty-First Amendment to repeal Prohibition, the country soon set into place the legacy quota systems that now hamstring economic development in the industry. These quota systems parallel the comprehensive regulatory structures that Roosevelt implemented during his New Deal era, which included regulatory framework over telecommunication and utility companies, peanut quota systems, taxi medallion systems and other legacy regulatory frameworks that are not in question. There has been significant movement to deregulate a number of those industries, 80 years later.

26. U.S. CONST. amend. XXI, § 2.

27. See, e.g., *Granholm v. Heald*, 544 U.S. 460 (2005) (regarding the direct shipment of wine); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (licensing and fees to import beer into a state). Since the implementation of the Twenty-First Amendment, repealing the Eighteenth Amendment, states have attempted to take sole control of the regulation of alcohol. The courts, however, have consistently noted that the Twenty-First Amendment did not supersede other earlier Constitutional sections. In particular, conflict is often seen between the original Commerce Clause and the new Twenty-First Amendment. The courts consistently look to the legal framework developed prior to implementation of prohibition, invoking *stare decisis* type considerations even after implementation of the Eighteenth and Twenty-First Amendments, determining that the Twenty-First Amendment did not overrule legal decisions involving alcohol made prior to the amendments, but merely added the ability for states to regulate certain aspects of alcohol sales within their jurisdictions; a particularly interesting model. See *Granholm*, 544 U.S. at 462.

28. Elyse Grossman & James Mosher, *Public Health, State Alcohol Pricing Policies, and the Dismantling of the 21st Amendment: A Legal Analysis*, 15 MICH. ST. U. J. MED. & L. 177, 178 (2011) (discussing the shifting alcohol policies); Pamela S. Erickson, *Alcohol Deregulation by Ballot Measure in Washington State*, HEALTHY ALCOHOL MARKETPLACE 2 (2014), http://www.healthyalcoholmarket.com/pdf/Alcohol_Deregulation_by_Ballot_Measure_in_Washington_State.pdf (describing Washington's model and its recent deregulation).

29. See Grossman & Mosher, *supra* note 28, at 199.

Such regulation came in tandem with New Deal era regulations for many industries (which have since de-regulated, unlike the alcohol industry). For many states, this legacy alcohol regulatory system development in the 1930s and 1940s has grown increasingly entrenched and little effort has been made to modernize the alcohol regulatory systems.

An on-premise retail establishment³⁰ is a restaurant, bar, or tavern, serving beer, wine and spirits on site and by the glass. For on-premise retail sales licenses, state statutes typically fall into one of three distinct policies: licenses that are generally open and available without a numerical limit (such as Georgia and Oregon), licenses that are restricted by location, saturation, or other public policy, and licenses that are capped on a jurisdictional basis.³¹ A number of states implemented a quota system for licensing on-premise retail alcohol sales establishments.³²

This Article addresses the fractured state policy of holding those legacy licenses to the benefit of the licensee and the detriment of the following: economic development, increased state revenue, the consumer, and new business owners; and argues that legal jurisprudence does not support continuing the restrictive legacy markets for on-premise alcohol sales.

B. *Economics of Quota Systems*

In all U.S. jurisdictions, no on-premise (by the glass) sales of alcohol can be made without proper licensing by the state or local jurisdiction. For states with on-premise alcohol license quota systems, liquor licenses and the prices on the secondary market are unique to each state, political subdivision and market area. Thus, new businesses in states with a quota system must purchase an existing license from a current licensee in a capped system.

30. For purposes of this Article, the focus is on on-premise licensees who have a full beverage licenses, which allow the sale of beer, wine and liquor with minimal restrictions. Some jurisdictions have limited beer and/or wine sales licenses, or tasting rooms attached to production facilities. These types of licenses typically have more restrictive sales items and hours and are not at issue in this Article.

31. See Linda J. Munden, Comment, *Retail Liquor License and Due Process: the Creation of Property Through Regulation*, 32 EMORY L.J. 1199, 1209-38 (1983), for a discussion of the three types of licenses.

32. Premises selling alcohol are subject to specific state statutory requirements, and are also subject to concurrent federal requirements as set out in 27 C.F.R. pt. 646 (relating to alcohol and tobacco). The specifics of licensing requirements are generally subject to the state laws, while the federal laws set out certain advertising limitations for all alcohol industry members, as well as tax and bonding requirements for production facilities. See *id.*

In most states with quota systems for on-premise licenses, the prices vary based on a particular local market, not a state-wide basis. This variation in market value stems from the desirability of a location, driving the market value of purchasing a license from an existing license holder. According to Jim Saksa, a license in parts of New Jersey costs as much as \$1.6 million, and in parts of Philadelphia, \$200,000, and \$450,000 in Massachusetts.³³ Heading west, Utah recently allowed for a secondary market for licenses, and anticipates license sales may be about \$1 million, which is the equivalent to a license in Montana and New Mexico.³⁴ The funds for a new owner to purchase an existing license is typically leveraged or purchased with extensive mortgage requirements. Existing owners also use the value of their license as collateral to expand their business, and are active politically to protect their interests in the regulatory system.³⁵

Such a licensing system has been called a “regulatory capture;”³⁶ an economic theory arguing that regulatory agencies, originally created to act in the public interest, instead transform into agencies advancing the commercial or special concerns of interest groups that dominate the industry or sector the regulatory agencies are charged with regulating.³⁷ Regulatory capture is a form of government failure; it creates an opening for firms to behave in ways injurious to the public (e.g., producing negative externalities). For alcohol licensing, the laws are both entrenched and archaic, and have set up a system where licensees have such value in the existing market that the regulators are politically disincentivized to change the system, which is to the detriment of the public.

C. *Particular Markets as Examples of Economic Effects of Quota Systems*

In Montana, news agencies report that new businesses cannot open because the cost of a liquor license is prohibitive. For example, the

33. Saksa, *supra* note 14.

34. *Id.* The Montana Department of Revenue publishes the sales data for any sale of an all-beverage license, which can be accessed the Department’s website. See Montana Dep’t. of Revenue, *Purchase Price Report*, REVENUE.MT.GOV, http://revenue.mt.gov/Portals/9/11252014_1.pdf (last visited May 15, 2015). Montana all-beverage license holders may also have limited gambling, which may distort market prices.

35. See *id.*

36. *Id.*

37. See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990), for a discussions of regulatory capture. See also Ernesto Dal Bo, *Regulatory Capture: A Review*, 22 OXFORD REV. OF ECON. POL’Y 2 (2006); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory*, 106 Q. J. ECON. 4 (1991).

Flathead Beacon, a Montana newspaper, reported in October of 2104, business owner Melanie Cross planned to open a pub-style restaurant in downtown Kalispell, the tourist community that is a gateway to Glacier National Park. City officials supported the proposal, but Cross was unable to purchase a retail liquor license.³⁸ Montana has a state-wide quota system, based on population of major cities,³⁹ and there were no licenses available in downtown Kalispell.⁴⁰ The most recent sale of an all-beverage license in Kalispell occurred in July 2014, for \$500,000.⁴¹ Every major city in Montana has exceeded its allotted quota through mechanisms which grandfathered certain licenses or allowed floater licenses to be moved to metropolitan areas.

The Flathead Beacon reports Kalispell City Planners have been working for the past few years to re-energize the downtown area, and a unified message among business owners is that more restaurants and bars are needed.⁴² The Montana Tavern Association, the lobbying arm of the current licensees vehemently opposes any effort to expand or eliminate the quota system.⁴³

Massachusetts is a state with a hybrid on-premise alcohol license quota system. There is a state-wide quota system for package stores and retail on-premise licenses which a city or community can opt out of by petition.⁴⁴ As of 2013, 25 communities have opted out, with several community leaders considering it.⁴⁵ Generally, however, news reports indicate the communities are split on whether increasing the number of licenses is a positive or negative. A Massachusetts business journal reports that while certain business owners note that “not having a license limitation for on-premise consumption is part of a gener-

38. Dillon Tabish, *Liquor License Lockdown*, FLATHEAD BEACON (Oct. 15, 2014), available at <http://flatheadbeacon.com/2014/10/15/liquor-license-lockdown/>.

39. See MONT. CODE ANN. § 16-4-201.

40. Tabish, *supra* note 38.

41. *Id.*

42. *Id.*

43. The Montana Tavern Association has consistently taken the lobbying position that the quota system is a good one, and that it should not be expanded. *Hearing on H.B. 336 Before the H. Comm. On Bus. and Labor*, 64th Leg. (Mon. 2015) (statement of John Iverson, Montana Tavern Association lobbyist). See also *Not Familiar with the MTA?*, MONTANA TAVERN ASSOCIATION, <http://montanatavernassociation.com/> (touting the benefits of the quota system); Alexander Deedy, *Liquor License Capped Out: Montana at Limit Under Quota System*, HELENA INDEPENDENT RECORD (Jan. 25, 2015; 6:00 AM), available at http://helenair.com/news/local/liquor-licenses-capped-out-montana-at-limit-under-quota-system/article_e90f5928-033c-5e49-801d-b1a85935b4b1.html.

44. Taryn Plumb, *Communities Split over Recent Push to Lift Quotas on Bar Permits*, WORCESTER BUSINESS JOURNAL, (Sept. 30, 2013), available at <http://www.wbjournal.com/article/20130930/PRINTEDITION/309289976/communities-split-over-recent-push-to-lift-quotas-on-bar-permits>.

45. *Id.*

alized economic development” another noted that “I don’t think we should, in effect, try to hurt those who are already in business.”⁴⁶

In contrast, states with less restrictive alcohol licensing laws have an unrestricted number of restaurant and bar businesses that are flourishing. Oregon does not have a quota system, and a license to sell liquor, beer, or wine costs \$402 per year.⁴⁷ There is no secondary market for the license; nor is one needed. The hospitality and alcohol industry is booming, the regulatory framework is robust, and there is no indication that more social or public safety issues exist than in quota states. Wineries, breweries and distilleries in Oregon lead the nation in terms of craft and expertise.

The Oregon Liquor Control Commission reports that it has issued more than 135,600 server permits, has “mandatory alcohol server education,” and was the “first state to require server education in 1987.”⁴⁸ The Commission has 12,852 annual licenses; 6,855 of those are on-premise licenses (the remainder are off-premise licenses issued to convenience or grocery stores, wineries, breweries, distributors and distillers).⁴⁹ Oregon’s liquor Commission notes that Oregon generates \$8.8 billion in tourism revenue each year, and that, as of 2010, the beer industry generated \$2.4 billion, while the wine industry generated \$158.5 million.⁵⁰ Additionally, theft of liquor in Oregon was a mere .003% (or \$7,680) in Fiscal Year 2012.⁵¹

Comparing areas with on-premise alcohol quota systems, the high cost of entering the market has become a consistent negative effect on the economic development of downtown areas and popular tourist locations. In recent years, with the development of an American craft beer and spirits industry and a resurgence of classic cocktails, consumers, economic development members, and politicians are beginning to consider the need for modernization of alcohol restrictions.

The current owners of the legacy licenses continue, however, to exert political and legal pressure to protect their entrenched positions. Politically, licensees argue to continue the status quo. When other markets faced an opening of the regulatory structure, the market participants brought takings claims to control their prior hold on the market. Under current regulatory takings jurisprudence, on-premise

46. *Id.*

47. Tabish, *supra* note 38. See also Saksa, *supra* note 14.

48. Oregon Liquor Control Commission, *Fostering Business Growth* (2013), available at <http://www.oregon.gov/olcc/docs/communications/FosteringBusiness.pdf>.

49. *Id.*

50. *Id.*

51. *Id.*

alcohol licensees are likely to bring a takings claim if the markets are opened, however, this Article argues that such claims are likely to ultimately be unsuccessful.

III. PROPERTY INTEREST AND REGULATORY TAKINGS CLAIMS WHEN THE GOVERNMENT AFFECTS MARKET CHANGE THROUGH EXPANSION

This Article⁵² focuses on challenging the validity of the takings argument made by the current licensees who are attempting to politically and legally control the exclusivity of their market place.⁵³

The Constitution, courts, and legal scholars consistently note that reasonable limiting principles are necessary in order to encourage desirable governmental regulation without bankrupting national trea-

52. This Article addresses solely the takings claim in these types of cases. There are several other lines of alleging an impairment of contracts claim against a governmental entity when a statute renders certain licensed activities prohibited or severely restricted. Those cases bear similar legal arguments and can be illustrative in reviewing legal trends in licenses as property. *See, e.g.,* Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 440 (8th Cir. 2007) (denying an impairment of contract claim for use of gaming machines after legislature abolished specific style of gaming); Yellow Cab Co. v. City of Chi., 3 F. Supp. 2d 919 (N.D. Ill. 1998) (holding that the contract clause prevents impairments but not full breach of contract when ordinance negatively affected prior settlement). Further, analysis of definition and valuation of property, including intangible values such as goodwill in eminent domain cases may be of value in the analysis of a license as property in a takings claim. *See, e.g.,* Brian A. Lee, *Just Undercompensation: The Ideosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 614-15 (2013). Additionally, the definition of a license as property when looking at due process requirements may also be of interest. *See* Linda J. Munden, *supra* note 31. In addition, an interesting line of cases addresses economic liberties, and the right to pursue one's livelihood. Such claims may be a methodology or consideration for challenge to the legacy license system. *See, e.g.,* Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (finding the owner of a jitney service could not be precluded from competing with taxi companies); conflicting decisions in sale of caskets by those other than licensed funeral directors in *Craigsmiles v. Giles*, 110 F. Supp. 2d 658, 666 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) and *Powers v. Harris*, 2002 U.S. Dist. LEXIS 26939 (W.D. Okla. 2002) *aff'd*, 379 F.3d 1208 (10th Cir. 2004). *See* STEVEN J. EAGLE, *REGULATORY TAKINGS* 60-61 (4th ed. 2009), for further analysis.

53. This Article does not directly address all of the research relating to societal dangers tied to increased on-premise licensees selling into a market. The research, however, generally shows that any concern about the increased access to on-premise alcohol by the glass can be combated by an increased enforcement of current regulations. Increasing the number of on-premise sales locations should generate increased licensing revenue to allow the government to eliminate bad actors in the industry. Additionally, the government will not face pressure to remove bad actors from the market when the market will allow for new actors to enter. Also, the research data shows that accessing alcohol in moderation may be beneficial in preventing the greatest societal danger of alcohol intake: overconsumption in a single instance. *See* Paul J. Gruenwald, *Regulating Availability: How Access to Alcohol Affects Drinking and Problems in Youth and Adults*, 34 ALCOHOL RESEARCH AND HEALTH 248, 248 (2011). *See* *Distilled Spirits Council*, *supra* note 16, for data relating to the advantages of alcohol consumption in moderation.

sury.⁵⁴ There is little doubt that the founding fathers of the U.S. legal system would not have considered the extent of the use of the Takings Clause; originally envisioned to prevent the Government's "actual physical seizure of private property" without just compensation.⁵⁵ How does the economics of opening up a restricted market interplay with courts' consideration of a takings claim in a licensing case?

There is a rich history of the framework for regulatory takings in a variety of contexts, as well as a long history of takings claims in the physical use of alcohol licenses. There is not, however, much legal precedent relating to a regulatory taking in the value of the alcohol license itself, even though the value of the licenses may range upwards of millions of dollars.⁵⁶

The term regulatory taking is the legal shorthand for the gray area between regulations and takings.⁵⁷ Not surprisingly, one of the early regulatory takings cases (1887) involved the regulation of alcohol. In *Mugler v. Kansas*,⁵⁸ a brewery owner argued a taking of his property when a law was passed that prohibited the manufacturing of beer. The U.S. Supreme Court determined that regulations under the police power were not compensable under the Fifth Amendment.⁵⁹ It was not until 1922, in *Pennsylvania Coal v. Mahon*⁶⁰ when the Court expanded its view of the Takings Clause to include regulatory actions.⁶¹

54. See U.S. CONST., art. V; see also GEOFFREY STONE, CONSTITUTIONAL LAW 971 (4th ed. 2001).

55. ROBERT MELTZ, DWIGHT MERRIAM & RICK FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 129-30 nn.2-4 (1999) (citing J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 91-96 (1995); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 58-60 (1964); William M. Treanor, *The Original Understanding of the Takings Clause and Political Process*, 95 COLUM. L. REV. 782 (1995); William M. Treanor, *The Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985)). Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-15 (1992) with *id.* at 1055-60 (Blackmun, J. dissenting).

56. See Saksa, *supra* note 14.

57. EAGLE, *supra* note 54, at 5.

58. 123 U.S. 623 (1887).

59. *Id.* at 675.

60. 260 U.S. 393 (1922). There is some debate whether regulatory takings cases may have developed prior to *Pennsylvania Coal*. See TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 1, 4 n.22 (Thomas E. Roberts, ed. 2002).

61. *Pennsylvania Coal*, 260 U.S. at 415. There are a variety of takings claims not directly addressed in this Article, including physical takings, total regulatory takings, partial regulatory takings or a land-use extraction. In 2005, the Supreme Court clarified in *Lingle v. Chevron*, that "a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories . . . - by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548

The seminal 1978 case, *Penn Central Transportation Co. v. New York City*, governs partial regulatory takings cases such as restrictions on private property use by directing an ad hoc analysis of particular facts.⁶² In *Penn Central*, the City of New York designated Grand Central Station as a historic landmark, thus requiring the owner to seek municipal permission for any changes to the structure.⁶³ Penn Central's owner then leased the airspace above the station to a developer who intended to build a large office building.⁶⁴ The City denied the required permits.⁶⁵ The Court noted that takings issues are a "problem of considerable difficulty" and that no set formula could determine when economic injuries caused by public action were to be compensated by the government.⁶⁶

The Court stated that an ad hoc factual inquiry was required and put forth three factors for consideration. Those factors which have "particular significance" are: first, "the economic impact of the regulation on claimant"; second, its interference with reasonable "investment-backed expectations"; and third, "the character of the governmental action."⁶⁷

Under the above analysis, the Court determined that the partial economic impact was not significant, and that the relevant measure and that the railroad was able to earn a reasonable rate of return.⁶⁸ *Penn Central* is a seminal case for much takings jurisprudence.⁶⁹ Steven Eagle provides in his book *Regulatory Takings*, that it is important to note that "the notion of free competition permeates the common law and is marked by the judicial refusal to award damages for engaging in competitive behavior."⁷⁰ As determined by the cases discussed below, the courts, however, do not focus on all of the factors set out in *Penn*

(2005). See also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1167 (1967).

62. 438 U.S. 104, 124 (1978).

63. *Id.* at 115-16.

64. *Id.* at 116.

65. *Id.*

66. *Id.* at 123-24.

67. *Penn Central*, 438 U.S. at 124.

68. *Id.* at 136. The Court later addressed the regulatory taking in *Tahoe Sierra Preservation Council v. Tahoe Reg'l Agency*, 535 U.S. 302, 323 (2002) (noting that analysis "necessarily entails complex factual assessment of the purposes and economic effects of government action"). See also *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001) (looking at "the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action").

69. See, e.g., F. Patrick Hubbard, Shawn Deery, Sally Peace & John P. Fougereousse, *Do Owners have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F., 121 (2003-2004).

70. EAGLE, *supra* note 54, at 506.

Central, but rather focus solely on the third; the character of governmental action.

The Supreme Court in *Lucas v. SC Coastal* cautions that without the Takings Clause, personal property may be rendered “economically worthless.”⁷¹ Does the takings requirement need to have some level of commitment in the property by the government?⁷² And how does that interplay with the Lockean ideal that one’s labor serves as proxy for property rights? Is it possible, as a market opens up, for the licensee to protect the value of one’s labor in a court of law? Or is it only possible for the licensee to compete in the free market?

While the Supreme Court notes that personal property can, of course, be wiped out without compensation, the ultimate holding in *Lucas* allows for opportunities for property to be valuable, protected, and ultimately paid for by the government when the government interferes with the marketplace and the valuable asset of private property. In contrast, there is no constitutional right to be free from competition, let alone a right to force the government to pay an entity when the market forces allow competitors into an open market. The Constitution is meant to protect people *from* the government unreasonably restricting their right to earn an honest living. It is not a tool for entrenched businesses to shut down entrepreneurs offering a better service for a lower price.

When consumers push political entities to open the regulated liquor markets, what cost will be incurred in the transition to an open market and who will ultimately bear that economic effect? The current license holders are the stumbling block for positive economic change. Their political strength has allowed them to raise the legal red herring of a valid takings claim when the government eliminates a quota system.

A. *Review of Legal Characteristics of On-Premise Licenses*

Licensees claim that, for all purposes, their license is worth the price sold on the open market, including a Fifth Amendment takings claim for compensation if the market is opened to other players. In reviewing some of the various courts’ treatment of takings in the context of alcohol licenses and the restriction of those licenses by governmental

71. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992); *see also* *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F Supp. 2d 200, 215 (D. Mass. 2006) (noting that the Supreme Court “cautioned [private property] could be wiped out without triggering the strictures of the Takings Clause”); *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993); *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

72. *See* Susan Eisenberg, Note, *Intangible Rights*, 60 VAND. L. REV 667, 681 (2007).

interference,⁷³ the majority of cases and scholarly work relating to liquor licenses have either focused on the property aspects in relation to due process analysis⁷⁴ or takings in the context of zoning cases.

Numerous cases in a variety of jurisdictions have addressed takings claims and alcohol licenses. Typically those cases relate to classic zoning restrictions of the use of a retail-sales alcohol license. In analyzing the property aspects of liquor licenses in a takings claims relating specifically to zoning, trends indicate that a full restriction of use of license will likely trigger a cognizable takings claim.⁷⁵

While there is some validity in that claim when the government restricts the use of a license (such as a zoning claim), and the plaintiffs have a reasonable expectation of a successful takings claim, review of relevant case law indicates there is not however, a valid claim for the value of the license when the market deregulates or opens to additional market players.

While it is generally straightforward to consider the property characteristics of tangible items or real property, including the right to obtain, the right to alienate, or considerations of transferability or exclusivity, a government issued license may grant some of those rights (or not) and may also carry others, such as right to renew or state's right to revoke.⁷⁶ Might a license be a property right but yet not be a property right that can also have a compensable takings claim attached to it? There are several lines of legal property theories that may help to determine some of these questions. For example, a license may be akin to a franchise right, such of that in *City of Oakland*

73. Burden of proof is on the plaintiff within any takings context. See *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (analyzing burden of proof in a partial takings claim).

74. See, e.g., Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441 (1994-1995) (addressing substantive due process and equal protection claims in relation to governmental control over liquor licenses).

75. See *San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 246 (Tex. Ct. App. 2006). Plaintiffs argue a takings claim when zoning eliminated ability to run nightclub under current license. *Id.* at 243. San Antonio claims a legitimate use of police powers. *Id.* at 244. The court noted that a "regulatory taking" uses an ad hoc factual inquiry. *Id.* San Antonio says taking requires "physical invasion" and "denies owner all economically beneficial or productive use of the land or interferes with the landowner's rights to use and enjoy its property." *Id.* at 24 (citing *Sheffield Dev. Co v. City of Glenn Heights*, 140 S.W.3d 660, 677 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998)). However, if ordinance has prevented the most profitable use, such action does not conclusively establish taking. See *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994); see also *Lowenberg v. City of Dallas*, 168 S.W. 3d 800, 802 (Tex. 2005).

76. See Munden, *supra* note 31, for a discussion of these issues in relation to alcohol licenses. See also Saxer, *supra* note 63.

v. Oakland Raiders.⁷⁷ Or such license may have more of a personal property aspect to it, or might it be like a benefit⁷⁸ that is a statutory entitlement that requires due process to eliminate but not rise to the level to allow a taking.⁷⁹ In the cases mentioned in this Article, the courts address some aspects of the property notion of a license. However, the ultimate decision rests on the governmental action; the governmental right to change a regulatory structure. Thus, while it is important to understand the scope of property interests for licensing, ultimately the courts focus the question on governmental action, and no license has yet risen to the level of property that triggers a compensable Fifth Amendment takings claim when the government opens a restricted or capped market.

B. *The Economics of Opening a Closed Market and Its Effects on Licensees*

The New Deal era imposed comprehensive regulation on a variety of U.S. industries. Regulators, consumers, and businesses have pushed to deregulate many of those industries since that time, including interstate trucking, air transport, electric utility, and telecommunications industries.

For large scale industries subject to deregulation in a market, such as trucking and air transport, tangible assets could be redeployed to differing markets to service demand. For other large-scale industries, a shift from monopolies to open competitive markets, with use of fixed immobile assets such as utility plants, shifted the value structure of those companies. Significant analysis is available for the advantages⁸⁰ and disadvantages of deregulation of large-scale industries.⁸¹

77. 646 P.2d 835 (Cal. 1982).

78. See *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970).

79. *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986). See *Hage v. United States*, 51 Fed Cl. 570 (2002), for a discussion of plaintiffs' rights in their grazing permits, and whether change in the permit system triggers a Fifth Amendment taking.

80. Arguments have been made that deregulation without accounting for "stranded costs" constitutes a deregulatory taking. Compare Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801 (1999), and J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U L. REV. 851 (1996), with Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801 (1999). Courts have not yet adopted a deregulatory takings approach, but it has been referenced by courts in telecom cases. See, e.g., *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 411 (1999); *U.S. West v. M.N. Pub. Util. Comm'n*, 55 F. Supp. 2d 968, 987 (D. Minn. 1999).

81. Economic analysis has addressed whether there is an argument as to whether consideration should be given to the imbalance that occurs when a regulatory taking creates an economic windfall or benefit to other group, which could be termed a regulatory "giving." See DEAN MISZCZYNSKI & DONALD HAGMAN, *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND*

There is less analysis of the effects on opening markets when the licenses are local and held by individuals or small corporations. It has only been in the last decade that certain areas such as individual legacy licenses have been subject to political, economic and consumer driven movement to open up the markets. In this instance of negatively affecting the economic value of licenses of smaller corporations and individuals, does that change the economic analysis or the expected treatment of those industries by the court systems?

When markets are opened to the financial detriment of current license holders, are there any legal remedies available? The cases addressed in this Article focus on industries where the licenses are held by individuals, or used by individuals and small corporations, instead of a deregulation that is affecting only a handful of corporate entities. To date, for a case in which an individual licensee's value in that license is restricted, or partially restricted by the governmental action, courts typically analyze the economic impact of the regulation, its interference with reasonable investment backed expectation of profit and the character of the governmental actions⁸² as set out in the Supreme Court's *Penn Central* case.

What considerations must be analyzed to determine when reviewing a government issued license and considering a non-compensable regulation is compared to a compensable taking for opening a market? The ad hoc factual test set out in *Penn Central* (considering the economic impact of the regulation, its interference with reasonable investment backed expectation of profit and the character of the governmental actions) provides little framework to give license holders or regulators a basis to determine when a jurisdiction or judge may find a compensable taking. The court must look to whether a plaintiff possesses a property interest, and if so, what is the scope of that interest, and finally, even if a property interest exists, does it rise to one which allows the plaintiff to make a claim that such property has been taken, and as such compensation is required? Unfortunately for current license holders, any factual analysis provides little certainty as to

COMPENSATION (1978). See also ROBERT MELTZ, DWIGHT MERRIAM & RICK FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 159 (1999); Donald Elliot, *Givings and Takings*, 48 LAND USE LAW & ZONING DIG. 1, 3 (1996).

82. Courts note that "Regulatory Takings" can occur when significant restriction is placed upon owner's use of his property for which justice and fairness require compensation. See, e.g., *Pharm. Care Mgmt. Assoc. v. Rowe*, 429 F.3d 294, 306 (1st Cir. 2005). A court should analyze the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action. *Kaiser Aetna v. United States*, 444 U.S.164, 175 (1979).

the chances of prevailing. Further, the recent cases relating to opening closed markets focus on the ability of the government to set or change parameters for the market.

IV. ANALOGOUS CASES OF LICENSE AS PROPERTY IN TAKINGS CLAIMS

There are many philosophical, legal and economic definitions of property.⁸³ For purposes of examining a regulatory taking, "the concept that property is a system of rules that govern access to and control material resources"⁸⁴ provides a framework for consideration of licenses and their property aspects. The Supreme Court notes that property rights are not created by the Constitution, but rather created and defined by "existing rules or understandings that stem from an independent source such as state law[.]"⁸⁵

There is no doubt that a license in a closed market will have economic value, and that there is an "economic impact"⁸⁶ on a license after a regulatory change. While statutory construction is variable in each jurisdiction, trends generally base the compensable nature of a property right in a license situation on the right to obtain, right to alienate, right to renew and the state's right to revoke.⁸⁷ If a property owner, however, has an expansive property right which can be com-

83. To even describe or define property goes beyond the scope of this Article. As the Court stated in *Florida Rocks Indus. v. United States*,

[p]roperty interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests—life estates and various types of fees – and future interests), and in terms of shared interests (such as various types of co-ownership). There are specially structured property interests (such as those of a mortgagee, lessee, bailee adverse possessor) and there are interests in special kinds of things (such as water, and commercial contracts.

18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994).

84. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 31 (1988); EAGLE, *supra* note 54.

85. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

86. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

87. Saxer analyzes these specific rights in her law review article, as does Linda Munden. See Munden, *supra* note 31; Saxer, *supra* note 63. The cases relating to takings claims do not have the same linear analysis as the law review articles noted, but generally consider the same type of rights when looks at an ad hoc factual analysis under *Lucas*. Since states differ on whether their licenses may be treated as property, and may even be treated as property in some instances but not others. See, e.g., *Minnesota v. Saugen*, 169 N.W.2d 37, 42 (Minn. 1969) ("It is submitted that whenever the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities to anyone qualifying under the statute, the property element in the license is sufficiently recognized to warrant its exposure to seizure by the creditors of the license."). This can be contrasted with the Minnesota taxi medallion case that distinguished *Saugen* by noting that *Saugen* was a complete revocation of a license, in comparison to amending the licensing structure to allow more participants in a limited market. *Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis*, 572 F.3d 502, 507-08 (8th Cir. 2009).

pensated by the government upon a mere change in zoning laws, how is it then possible that there could be no takings claim if the government immediately sets those license values to zero via the legislative or regulatory process of opening a market?

In a regulatory context, courts note that a licensee in the on-premise alcohol sales arena who makes expenditures should be held to know that the revocable nature of the license and act upon their own risk.⁸⁸ What is the line however, for determining whether a license is revocable or not? And when the government must consider whether that license now attaches some level of liability if the government acts to infringe upon it, not by narrowing the market, but by expanding the market?

Licenses in a jurisdiction with a quota system are arguably both more valuable and also more likely to be considered property, as they have a higher level of exclusivity and transferability. While there are many cases that suggest that an alcohol license may be property, or at least have value, there is yet no case law that addresses whether there is a viable argument that a legacy license under the quota system has property value that rises to the level that would require compensation under the takings regime. There are, however, several similar cases that provide some framework for consideration.

A. *Grazing and Assault Weapons*

The U.S. Supreme Court has evaluated a variety of other regulatory frameworks when determining whether a governmental permits and licenses give rise to property interests, which are protected by the Fifth Amendment. To begin, the U.S. Supreme Court has determined that express statutory language may prevent the formation of a protectable property interest.⁸⁹ In some states, alcohol licenses may have specific statutory language, which may prevent a licensee from asserting an expectation of property interest in the license. In those instances, those licensees are likely to know that their licenses do not have the hallmarks of a valuable property interest.

Many jurisdictions have legacy on-premise alcohol licenses in which the statutory language does not address the property interest. Without express statutory language, courts have looked to the “hallmark

88. See, e.g., *Larson v. Amundson*, 414 N.W.2d 413, 418-19 (Minn. Ct. App. 1987) (allowing respondent to deny access to property).

89. See *United States v. Fuller*, 409 U.S. 488, 494 (1973) (Supreme Court refused to recognize property interest in grazing permits based on statutory language setting “congressional intent that no compensable property right be created”); see also *Peanut Quota Holders Assoc. v. United States*, 421 F.3d 1323, 1330 (2005) (citing *Fuller*, 409 U.S. at 494).

rights" of transferability and excludability as part of the bundle of property rights⁹⁰ when the government restricts use of a license.

The majority of the court cases note that benefits that individuals derive from the government generally do not rise to compensable levels – whether looking solely at the governmental action or the licensee's expectation of profit. Judicial review of grazing permits illustrates this point.⁹¹ In *McKinley v. United States*, a grazing permittee sued to set aside a U.S. Forest Service reduction in the number of cattle allowed to graze on the permittee's national forest lease.

In *McKinley* the District Court noted:

While the Court does not doubt that the modification of appellant's [grazing] permit has a negative effect on the value of his base property and the viability of his ranching operation, the value added to his property by his holding the permit is clearly a 'benefit and privilege bestowed by the government[.]' . . . 'Although the permits are valuable to ranchers, they are not an interest protected by the Fifth Amendment against taking by the government who granted them with the understanding that they could be withdrawn . . . without payment of compensation.'⁹²

The Court held that the value added to the permittee's property was "a benefit and privilege bestowed by the government," and "[n]o compensable taking" of permittee's private property occurred.⁹³

Under a *Penn Central* analysis of the investment backed expectation that may occur when a plaintiff relies on a government issued permit, the Court in *Mitchell Arms Inc. v. U.S.* notes that when a citizen voluntarily enters into a market subject to pervasive government control he cannot be said to possess the right to exclude.⁹⁴ In *Mitchell Arms*, a firearms importer sued the United States alleging that suspension and subsequent revocation of import permits for assault rifles was a compensable taking under the Fifth Amendment.⁹⁵

Mitchell Arms imported assault rifles under a federal permit for several years. Under new rules, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") suspended and ultimately revoked

90. *Peanut Quota Holders*, 421 F.3d at 1330; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) (describing the right to dispose of property as part of an individual's bundle of property rights); see, e.g., *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004).

91. See, e.g., *Fuller*, 409 U.S. at 494.

92. *McKinley v. United States*, 828 F. Supp 888, 893 (D.N.M 1993) (quoting *Pankey Land & Cattle Co. v. Hardin*, 427 F.2d 43, 44 (10th Cir. 1970)).

93. *Id.*

94. *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993).

95. *Id.* at 215.

Mitchell Arms' permits to import.⁹⁶ A number of assault rifles were seized by customs when the permits were suspended.⁹⁷ Mitchell Arms argued that the contractual relationship to import those assault rifles, based on reliance of the federal permit, gave rise to a reasonable investment backed expectation protected by the Fifth Amendment.⁹⁸ The Federal Circuit Court ultimately disagreed and held that the frustration of the importers' financial expectation by revocation of the permit was not a Fifth Amendment taking.⁹⁹

B. *Peanut Quota Holders and Quota Licenses*

The issues for determining whether a valid regulatory takings claim in a legacy or closed market are set out in *Members of the Peanut Quota Holders Assoc., Inc. v. United States*.¹⁰⁰ In *Peanut Quota Holders*, the government provided certain limited peanut growing allotments, and advantageous financing for those holding peanut quotas, with penalties for peanut growers who do not hold quota licenses.¹⁰¹ The peanut quota system has been in effect since the New Deal era, and the peanut quotas have significant value.¹⁰²

In 2002, the federal government passed the Farm Security and Rural Investment Act of 2002, which required that holders of the peanut quotas must actually farm the quotas.¹⁰³ Previously, holders of the quotas leased the quotas to other farmers, creating a secondary market. Farmers who leased their peanut quotas to other farmers brought suit against the U.S. alleging that the elimination of their quotas constituted a regulatory taking.¹⁰⁴

After reviewing the transferability and exclusivity of the quotas, the court ultimately held that the Peanut Farmers have a property interest in their license.¹⁰⁵ The case notes that

[t]he salient difference between the licenses in the noted cases and the peanut quota allotment is that the value of the peanut quota is considerably more concrete. A license represents a limited suspension of the otherwise general restrictions imposed by the government—in the case of a fishing license, it is merely a representation by the government that it will not interfere with the licensee's ef-

96. *Id.* at 214.

97. *Id.*

98. *Id.*

99. *Mitchell Arms*, 7 F.3d at 217.

100. 421 F.3d 1323 (Fed. Cir. 2009).

101. *Id.* at 1326.

102. *Id.*

103. *Id.* at 1325.

104. *Id.*

105. *Peanut Quota Holders*, 421 F.3d at 1335-36.

forts to catch fish. The number of licenses to be issued under such a scheme is not fixed. Each additional license dilutes the value of the previously issued licenses. So long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive. Neither the fisherman nor the firearms salesman can exclude later licensees from entering the market, increasing competition, and thereby diminishing the value of his license.¹⁰⁶

The *Peanut Quota Holders* thus notes that a compensable interest in property is indicated by the following factors: "express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude."¹⁰⁷

While *Peanut Quota Holders* articulates the above standard, it then denies the takings claim with the following:

The question, therefore, is not whether the peanut quotas have aspects of property, but whether Congress must pay the owners of peanut quotas compensation when it takes steps that render the quotas less valuable, or even valueless. The answer is no, because the property interest represented by the peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election.¹⁰⁸

The *Peanut Quota Holders* uses the analogy:

food stamps in the hands of food stamp recipients are property. Theft or fraud that deprived the owner of food stamps would surely be punishable as theft or fraud directed at property. But, the government's decision to terminate the food stamp program before the food stamps could be issued would not give rise to an obligation to compensate prospective holders of the stamps.¹⁰⁹

The court applies the same principle to the peanut quotas such that "peanut quotas are property, but they are a form of property that is subject to alteration or elimination by changes in the government program that gave them value."¹¹⁰ The Eighth Circuit found the quotas are a privilege and "holders of peanut quotas, like the holders of food stamps, have no legally protected right against the government's mak-

106. *Id.* at 1333-34.

107. *Id.* at 1331 (citing *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004); *Conti v. United States*, 291 F.3d 1334, 1341-42 (2002); *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993); *United States v. Fuller*, 409 U.S. 488, 494 (1973)).

108. *Id.* at 1334.

109. *Id.*

110. *Peanut Quota Holders*, 421 F.3d at 1334.

ing changes in the underlying program and no right to compensation for the loss in value resulting from the changes.”¹¹¹

The *Peanut Quota Holders* notes that the government is “free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.”¹¹² Citing to *Pub. Agencies Opposed to Soc. Sec. Entrapment*,¹¹³ *Peanut Quota Holders* notes that

Congress at all times retains the ability to amend statutes, a power which inheres in its authority to legislate, Congress at all times retains the right to revoke legislatively created entitlements. In this case, the Court finds that there is nothing to suggest that the peanut quota program was intended to provide irrevocable benefits to quota holders.¹¹⁴

The court found that the question is not “whether the peanut quotas have aspects of property, but whether Congress must pay the owners of peanut quotas compensation when it takes steps that render quotas less valuable, or even valueless.”¹¹⁵ It noted the “answer is no, because the property interest represented by peanut quota is entirely the product of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government’s election.”¹¹⁶

Could a license holder still have an expectation of a compensable property right under the takings clause? When the Eighth Circuit notes in *Peanut Quota Holders*, “[t]he government is free to create

111. *Id.* at 1334-35 (citing *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987) (“Congress is not, by virtue of having instituted a social welfare program, bound to continue it. . . .”).

112. *Id.* at 1335. The Peanut Court continues with an explanation of why government termination of such a program does not give rise to a right of compensation has been stated in different ways at different times. It is sometimes said that the property holder’s rights in the property have not “vested”; it is sometimes said that the property holder has no investment-backed expectation of maintaining a continued right to the property, and it is sometimes said that the property is in the form of a gratuity that the government has explicitly or implicitly retained the right to alter or revoke. Each of these characterizations captures the essence of the reason the government’s action does not give rise to a constitutional duty of compensation. . . .

Id. (internal citations omitted).

113. *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (noting that courts should be “extremely reluctant” to construe statutes in a manner that forecloses the ability of Congress to exercise its legislative powers).

114. *Peanut Quota Holders*, 421 F.3d at 1335.

115. *Id.* at 1334.

116. *Id.*

programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses,"¹¹⁷ the statement appears to make clear that a licensee has little right to expect compensation when the statutory framework changes and devalues his or her investment, which has value in a secondary market.

Peanut Quota Holders is analogous to the alcohol licensing cases in the sense that those peanut quota licenses were legacy licenses set up in the New Deal era, provided some level of exclusivity and transferability, and ultimately had a great financial value to the holders of those licenses. The licenses had essentially created a secondary market by the licensees themselves, which the government moved to eliminate.

This case indicates that the consideration of whether the government can change the regulatory system is the sole issue for consideration in a case where devaluation of a license occurred after government action. Such an outcome indicates that any other test, or even a factual inquiry under *Penn Central* is likely irrelevant when the government may change a licensing system.

C. *Analyzing Taxi Medallions: A Legacy Licensing System*

While we can extrapolate much legal analysis from peanut legacy quota system and regulatory structure of opening a market under *Mitchell*, recent taxi medallion cases provide the closest parallel to the legal analysis for opening the market for alcohol licenses in a quota driven market.

In the cases of taxi medallion holders, the licenses are also legacy licenses, subject to some level of exclusivity and transferability under a quota system. In addition, those licenses had substantial property value due to an advanced secondary market. Only recently has the government in certain jurisdictions moved to open up those legacy taxi markets, and the holders of the taxi medallions sued under a variety of claims, including Fifth Amendment takings claims.

Owners of taxi medallions in a closed market have filed takings claims when the governmental entity passed an ordinance to open the market to additional licensees.¹¹⁸ As of yet, none of the legacy license holders have been successful in their takings claims.

117. *Id.* at 1335.

118. *See, e.g., Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 504 (8th Cir. 2009).

The taxi medallion cases advance the *Peanut Quota Holder* case and additionally review whether a takings claim is valid for a legacy license system where the license is capped or regulated, creating substantial value on the secondary market, and government action opens the market for new participants.

The taxi medallion system has been in place parallel to the alcohol quota system. Similar to alcohol license markets, consumers are pushing for changes in the antiquated legacy transportation market system. For example, Uber¹¹⁹ has created an expectation of mobility around major metropolitan areas that has affected medallion license holders as consumers' expectation of service has increased.¹²⁰

During the late 1920s and 1930s, many jurisdictions began to require licenses for taxi systems. New York's taxi regulatory system is particularly illustrative of the regulatory scheme that exists in many metropolitan areas.

The end of the Nineteenth Century saw a major increase in the number of automobiles, which also increased the number of automobiles "hiring themselves out in competition with horse drawn carriages."¹²¹ New York City, for example, had "nearly one hundred taxi cabs" and shortly after the turn of the Century, there were many "large fleets and thousands of independent driver/owners."¹²² In 1937, after consistent issues with "unfair labor practices, price gouging, and unsafe conditions," then-Mayor of New York City Fiorello H. La Guardia "signed the Haas Act, which introduced New York's first . . . taxi licenses and medallion system."¹²³ The medallion system remains in place today in many major cities.¹²⁴

"Medallions are small plates attached to the hood of the taxis certifying that the car is available for passenger pick-up."¹²⁵ Many juris-

119. Uber, Lyft and other companies are ride-sharing services developing primarily in urban areas where private drivers offer ride services previously controlled by taxi companies. Such companies are opening markets that are arguably regulated to prevent such competition. AirBnB, a room sharing service provides a similar market-opening concept in the hotel industry. See Sangeet Choudary, *How The Hotel Industry Got Blindsided . . . And Why Yours Could Be Next*, FORBES (July 7, 2014, 11:12 AM), <http://www.forbes.com/sites/groupphink/2014/07/07/how-the-hotel-industry-got-blindsided-and-why-yours-could-be-next/>.

120. See *Yellow Group LLC, et. al. v. Uber Techs., Inc.*, No. 1:2012cv07967, 2014 U.S. Dist. LEXIS 94093, at *20-21 (N.D. Ill. 2014).

121. *Dennis Melancon, Inc. v. City of New Orleans*, LEAGLE.COM, <http://www.leagle.com/decision/In%20FDCO%2020120821B51/DENNIS%20MELANCON,%20INC.%20v.%20CITY%20OF%20NEW%20ORLEANS> (last visited May 15, 2015) (providing an in-depth analysis of *Dennis Melancon, Inc. v. City of New Orleans*, 889 F.Supp.2d 808 (E.D. La. 2012)).

122. *Id.*

123. *Id.*

124. See *id.*

125. *Id.*

dictions capped the number of licenses, and the limited number of medallions allowed the cities to manage enforcement actions and quality of taxi activity.¹²⁶ The medallion system became entrenched in many major markets, and a secondary market for the medallions has created significant value.

Recently, there has been an economic and consumer push to change the regulatory system to allow for an increased market, in New Orleans, Chicago, and Minneapolis.

In 2006, the City of Minneapolis "amended its taxicab ordinance to uncapped the number of transferrable taxicab licenses issu[ed] by the City]" that led to litigation against the City by current license holders.¹²⁷ Similar to a liquor license, the taxicab licenses (medallions) were "originally purchased from the City for a relatively small fee [of \$500]," and were transferrable.¹²⁸ A secondary market developed for the medallions, which generated sales of \$19,000 to \$25,000.¹²⁹ Beginning in 2006, the City held "open public convenience and necessity hearings," pursuant to Minneapolis Code of Ordinances.¹³⁰ After the hearing, the City's Department of Licenses and Consumer Services submitted information indicating an "insufficient availability of taxis, especially handicap accessible taxis and, during peak hours, taxicabs generally," with potential plans to ameliorate the matter.¹³¹ The Committee determined it would implement a plan to "increase[] the number of licenses by forty-five each year until 2010 when the cap would be completely lifted."¹³² The plan also required a certain percentage of licensed taxi fleet to be "wheelchair-accessible vehicles and fuel efficient vehicles."¹³³

In 2007, a coalition of licensees under the older system sued the City of Minneapolis in Minnesota state court claiming, "the new ordinance reduced the value of the existing licenses to zero."¹³⁴ Four claims were made:

- (1) the City deprived coalition members of their property interests without just compensation; (2) the City deprived Coalition members of their business licenses without due process; (3) the wheelchair-accessibility and fuel-efficiency requirements constituted an uncon-

126. *Dennis Melancon*, *supra* note 121.

127. *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 504 (8th Cir. 2009).

128. *Id.*

129. *Id.*

130. *Id.* at 505.

131. *Id.*

132. *Minneapolis Tax Owns Coal., Inc.*, 572 F.3d at 505.

133. *Id.* at 506.

134. *Id.*

stitutional extraction; and (4) the coalition members were denied equal protection because the amended, in part, to better serve the Hispanic community.¹³⁵

The case was removed to the federal district court, and the court decided the issue on a summary judgment motion.¹³⁶

Of most interest and parallel to the liquor licensing system is the takings claim. Citing Article Five of the U.S. Constitution, "[t]he Coalition argues that removing the cap on taxicab licenses is a taking of private property requiring just compensation" due to the devaluing of the license when the cap was removed.¹³⁷ The City did not contest that the license was devalued.¹³⁸ The Eighth Circuit analyzed the takings claim, noting that "[t]he elimination of the market value of the license[] . . . can only be considered a taking . . . if there is a protected property interest in the market value."¹³⁹ The Eighth Circuit further noted that none of the cases cited by the Coalition were applicable because the cases addressed full revocation of the licenses at issue.¹⁴⁰ Interestingly, one of the cases directly discussed by the Eighth Circuit was *State v. Saugen*.¹⁴¹ In *Saugen*, the Minnesota Supreme Court addressed a takings argument when a liquor licensee was unable to move his license to a new location, which effectively destroyed a "valid and unrevoked ability to engage in the liquor business."¹⁴²

The Federal District Court disagreed that the Coalition has a valid property interest that had been taken with the opening of the market. The court noted "a property interest cannot be extended to the going-concern value of a licensed business where that going-concern value is merely speculative."¹⁴³ The court also discounted the Coalition's claim that "a license to participate in a controlled market is a property interest in the restricted nature of that market, such that the City cannot, without just compensation, reduce the market value . . . by increasing [the number of licenses]."¹⁴⁴ The court notes that taxicab licenses are not similar to *Peanut Quota Holders* licenses, which have

135. *Id.*

136. *Id.*

137. *Minneapolis Tax Owners Coal., Inc.*, 572 F.3d at 506-07.

138. *Id.*

139. *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)).

140. *See id.*

141. *Id.*

142. *State v. Saugen*, 169 N.W.2d 37, 47 (Minn. 1969).

143. *Minneapolis Taxi Owners Coal., Inc.*, 572 F.3d at 508 (citing *Saugen*, 169 N.W.2d at 46; *City of Minneapolis v. Schutt*, 256 N.W.2d 260, 262-63 (Minn. 1977) (limiting *Saugen* to its facts)).

144. *Minneapolis Taxi Owners Coal., Inc.*, 572 F.3d at 508.

a guaranteed minimum price structure. Such a minimum creates a "concreteness of value" not found in the taxicab license.¹⁴⁵

The Eighth Circuit goes on to note that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, a [property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless. . . ."¹⁴⁶ The court also cited *Mitchell Arms, Inc. v. United States*, which stated that an enforceable property interest "cannot arise in an area voluntarily entered into and one which, from the state, is subject to pervasive Governmental control."¹⁴⁷

Finally, the court addressed that the Coalition claimed that its takings claim is "limited to the ability of realize an expectation in the ultimate market disposition of the license."¹⁴⁸ The court stated that the collateral interest is not protected by the Fifth Amendment.¹⁴⁹ In essence, even if there were a property interest in the license, the Coalition cannot assert that the government is responsible for a "property interest that is different and more expansive than the one actually possessed" – i.e., the value on the secondary market.¹⁵⁰

In the end, the U.S. Court of Appeals for the Eighth Circuit upheld the district court.¹⁵¹ The court distinguished the scenario where a jurisdiction, "created for its citizens a public marketplace for the assignment of its taxicab licenses . . . [where] the taxicab licenses in reality became more than just mere personal permits" from the taxi medalion case at issue where "licensees are still able to use their licenses and assign their licenses to others [and, as such, t]he economic effect is harder to distinguish."¹⁵² The court declined to establish a compensable interest.¹⁵³

Thus, the Eighth Circuit is careful to distinguish from the factual case where a licensee is entirely unable to use an aspect of their license that the licensee previously had, such as license restrictions in *Saugen* and *Boonstra*, and a scenario where the licensee can still use the license, but its potential economic value on the secondary market is constricted or eliminated.

145. *Id.* This is an interesting reference because, ultimately, *Peanut Quota Holders* denied the Fifth Amendment claim.

146. *Id.* at 509 (citing to *Lucas*, 505 U.S. at 1027-28).

147. *Id.* quoting *Mitchell Arms, Inc. v. U.S.*, 7 F.3d 212, 216 (Fed. Cir. 1993).

148. *Id.* (citing *Mitchell Arms, Inc.*, 7 F.3d at 217) (inner quotations omitted).

149. *Minneapolis Taxi Owners Coal., Inc.*, 572 F.3d at 509.

150. *Id.* at 509.

151. *Id.* at 510.

152. *Id.* at 507 n.4 (citing *Boonstra v. City of Chi.*, 574 N.E.2d 689, 694 (Ill. App. Ct. 1991)).

153. *Id.*

1. When Does a Takings Claim Prevail?

Similar to *Boonstra v. City of Chicago*, New Orleans attempted to partially restrict the taxicab licenses by method of municipal ordinance change, and the Court upheld a protected property interest when the state attempted to prohibit transfers of licenses.¹⁵⁴ In *Melancon v. City of New Orleans*, the Eastern District of Louisiana consolidated three individual cases and disposed of them under a Motion for Declaratory Relief when the City of New Orleans attempted to place certain new restrictions on taxicab licenses.¹⁵⁵ Specifically, the Ordinances attempted to prevent use of salvaged vehicles, prohibit transfers of a license when a suspension or revocation was pending, and require certain tracking, receipts, credit card usage, security systems and GPS systems.¹⁵⁶ The plaintiffs contested the validity and legality of the ordinances under the contracts clause, the Fifth Amendment and the Fourteenth Amendment.¹⁵⁷

The court determined that the licensees had a protectable property interest in their licenses, specifically because of the “ability to sell, encumber, lease and alienate their [licenses].”¹⁵⁸ The court stated that the ordinance directive to change the license from a right to a privilege was insufficient “if a government’s grant to a citizen has demonstrated characteristics inherent to a property right, such as the ability to transfer, encumber, lease or sell, for nearly sixty years, it may not convert it to a privilege by simply characterizing it as such.”¹⁵⁹ This is in line with the holding in *Boonstra v. City of Chicago*,¹⁶⁰ holding that the City of Chicago could not disallow the assignment of licenses when there was an established legacy secondary market.

The court went on to analyze whether the ordinance triggered an unconstitutional taking of that protectable property right by looking at regulatory takings jurisprudence.¹⁶¹ Specifically, the court referenced the *Penn Central* test.¹⁶² As discussed earlier, the *Penn Central* Court created a multi-factor test to determine whether a regulatory taking occurred.¹⁶³ “According to the *Penn Central* frameworks, courts should consider three factors (1) the character of the govern-

154. *Dennis Melancon, Inc. v. City of New Orleans*, 889 F. Supp. 2d 808 (E.D. La. 2012).

155. *Id.* at 812.

156. *Id.* at 812-13.

157. *Id.* at 813.

158. *Id.* at 817.

159. *Id.* at 818.

160. *Boonstra v. City of Chi.*, 574 N.E.2d 689, 695 (Ill. App. Ct. 1991).

161. *Dennis Melancon, Inc.*, 889 F. Supp. 2d at 819.

162. *Id.*

163. *Id.*

mental action (2) the economic impact on the claimant and (3) the extent to which the regulation has interfered with the property owner's reasonable investment backed expectation."¹⁶⁴ The court determined that the plaintiffs, in this instance, brought sufficient evidence to demonstrate that the City "reduced the value of the licenses to zero," leading the court to determine that the City's regulations interfered significantly with the reasonable investment-backed expectation.¹⁶⁵ In sum, the court concluded "the evidence on the record support[ed] the conclusion that the Plaintiffs have a substantial likelihood of success on their unconstitutional taking claim."¹⁶⁶

In *Dennis Melancon*, the court's initial analysis for determining whether a preliminary injunction was proper found that the plaintiffs were likely to prevail on the takings claim, and that the defendants failed to prove any evidence of public harm. The key distinction in the treatment of the license is critical. In both *Melancon* and *Boonstra*, the ordinances attempted to restrict the plaintiffs from using their license, with a system that had been in place for over sixty years. In the Minneapolis case, the court found that the licensees were still entirely able to use their license, and that the taking did not extend to the secondary market. This analysis seems based on an economic analysis of a secondary market in *Melancon* and *Boonstra*, but the courts in *Peanut Quota Holders* and *Minneapolis Taxi* found the secondary market valuation not persuadable.

2. What Can We Take from the Legacy Taxi Medallion Cases?

In comparing *Minneapolis Taxi* and *Melancon*, we can conclude that restrictions on existing licenses, especially with a valuable secondary market, may trigger a cognizable takings claim, but the claim is unlikely to be successful. Courts are challenged by the economic impact of deregulation when the licensees are a fixed class, creating a significant secondary market value. Even under a *Penn Central* ad hoc factual test, the courts, however, have recognized that the government's authority to open the market (as long as the prior statutory system has no restrictions) is absolute.

Thus, the ability for a licensee to bring a successful takings claim appears to be a red herring. A legacy license system, in which a licensee has extensive value in the license (with the ability to transfer the license, use it for mortgage options, have a realistic expectation that the government cannot restrict the use of that license without com-

164. *Id.*; *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124-25 (1978).

165. *Dennis Melancon, Inc.*, 889 F. Supp. 2d at 819-20.

166. *Id.* at 821.

pensation) is subject to the consumer push to open that market and devalue that licensee's legacy value and there will be little consideration of the secondary market value, as seen in the *Peanut Quota Holders* and *Taxi Medallion* analysis.

Under *Melancon*, however, one can note that the court is not entirely unsympathetic to a legacy system that has created a quasi-governmental stability over a long period of time. But, under factual analysis relating to the character of the governmental action, the grazing cases, *Mitchell Arms* and *Peanut Quota Holders*, as well as *Minneapolis Taxi*, tell us the courts find that the governmental entity has full right and ability to change a licensing system at any time.

Thus, if the question is a weighing of the three prongs of *Penn Central*, a plaintiff licensee will have an arguably good claim for the first prong, a questionable claim for the second prong, and little support, if any, for the third prong. Even if courts will likely recognize the economic effect on the plaintiff licensees, such a factual analysis will likely create a cognizable, but ultimately unsuccessful, legal claim. More likely, the economic impact on the licensees directs them to use political pressure to prevent a governmental entity from opening up or deregulating a closed licensing system.

If courts use *Peanut Holder* or *Minneapolis Taxi* analysis, the support is overwhelming for allowing license change, and there is no cognizable legal claim. Courts however, seem leery to quickly discount the plaintiffs' economic argument. Is it possible that the courts' decisions are affected by unstated political pressures, economic realities of devaluing current licensee's value on the secondary market, or public health factors? So far, the threat of the takings claim (or at least the belief that a legacy license has value) has kept these claims out of the courts and little legislative change has occurred.

D. *Game Farms and Comparative Law*

While taxi medallion cases may be illustrative in comparing historical licenses, the Montana¹⁶⁷ Supreme Court addressed the devaluation

167. Montana has restrictive alcohol license quotas that were set by census numbers in the 1940s. See MONT. CODE. ANN. § 16-4-201. The public has begun to question the quota system, especially with the increase of craft breweries, and, while no takings claims have been raised, the legislators are beginning to consider whether the system should be changed. This can be seen in the expansion of the brewery licensing systems and the increasing number of newspaper articles and discussions regarding the effects of the quota system on economic development. See Alexander Deedy, *Liquor License Capped Out: Montana at Limit Under Quota System*, HELENA INDEPENDENT RECORD (Jan. 25, 2015, 6:00 PM), available at http://helenair.com/news/local/liquor-licenses-capped-out-montana-at-limit-under-quota-system/article_e90f5928-033c-5e49-801d-b1a85935b4b1.html.

of licenses in a highly regulated industry, and whether a takings claim can prevail when the licensing system is subject to extensive regulatory oversight.¹⁶⁸ Most interesting to this case is the extensive dissent arguing that courts should address the extensive economic impact to licenses when a regulatory system changes to the detriment to current participants. Such considerations raised by the dissent may not trump the government's ability to regulate its license framework, but may hold sway with government regulators when looking at the process to open a previously closed market.

The game farm licenses, both its regulatory framework and the valuation of the licenses, are substantially similar to alcohol legacy licenses, though not as entrenched in the legal system. While the Montana Supreme Court majority denies the takings claim,¹⁶⁹ the dissent speaks extensively to the economic impact of eliminating the economic value gained in a licensing system, and argues for more consideration of the licensees' investment.¹⁷⁰ The argument is worth consideration in analyzing regulatory takings cases with high economic impact to licensees.

The Montana Supreme Court addressed takings in the context of a regulatory change to a valuable license when determining that a license to operate a game farm, intangible business assets, and the going concern value of game farms was not a compensable property interest under the federal takings clause.¹⁷¹ Game farms are typically ranches, where game farm licensees manage herds of elk or other trophy animals popular with hunters.¹⁷² In this case, the owners and operators of several alternative livestock game farms filed action against the state, alleging a taking of compensable property as a result of an initiative that prohibited charging a fee to shoot alternative livestock.

To operate a game farm requires a license issued by Montana Fish Wildlife and Parks. Due to the threat of Chronic Wasting Disease (a disease that can be transmitted from alternative livestock such as elk to domestic livestock such as cattle), the license requirements were demanding.¹⁷³ Several plaintiffs owned and operated game farms, some of which allowed for big game hunts. A Citizens Initiative was passed in 2000, which severely limited the game farm licenses by disallowing transfer of the license and also disallowing any shooting of

168. See *Kafka v. Montana Dep't. of Fish, Wildlife & Parks*, 201 P.3d 8 (Mont. 2008).

169. *Id.* at 23.

170. *Id.* at 43 (Nelson, J., dissenting).

171. See *id.* at 25.

172. *Id.* at 13.

173. *Kafka*, 201 P.3d at 36.

game for a fee at the alternative livestock facility.¹⁷⁴ The parties conceded that the game farm industry was highly regulated. The District Court reviewed the economic impact of the Initiative on the plaintiffs and considered whether there was a taking under the *Penn Central* test.¹⁷⁵ Ultimately, the District Court decided that any reasonable investment backed expectation appellants may have had regarding their game farms had to be tempered against “the reality that they were operating in a highly regulated, controversial field, where the Sate was free to change the regulatory environment.”¹⁷⁶ The plaintiffs appealed the decision to the Montana Supreme Court.

The Supreme Court noted that the takings claim required a two-step analysis, which first required a determination regarding whether a cognizable property interest as a factual question, and then if a cognizable property interest exists, whether the governmental action at use constituted a taking of the property.¹⁷⁷ The Court noted that generally “a license is simply a right or privilege granted by a sovereign authority to engage in a certain activity,” but that such license may contain property interests, such as a professional license or medical license.¹⁷⁸ The Court reviewed the *Peanut Quota Holders* case, noting that even though the *Peanut Quota Holders* may have a compensable property interest, “the government was under no constitutional duty to compensate the Members because neither the state nor the surrounding circumstances indicated that the quotas were irrevocable, and the government always maintained “its right to withdraw those benefits or qualify them as it chooses.”¹⁷⁹

The Court ultimately noted that the licenses in question did not meet the required criteria under *Peanut Quota Holders*, and thus no takings had occurred.¹⁸⁰ The Court further concluded that there was no taking of goodwill or other intangible property.¹⁸¹

While the game farm case does not address the opening of a regulatory system and the majority did not analyze property aspects in as much depth as the taxi medallion cases, the Montana Supreme Court did note that “the District Court found no case law for the proposition that a taking of a license occurs when a new regulatory requirement,

174. *Id.* at 13.

175. *See id.* at 16-17.

176. *Id.* at 16.

177. *Id.* at 18.

178. *Kafka*, 201 P.3d at 19-20.

179. *Id.* at 21 (citing *Members of the Peanut Quota Holders Assn. Inc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005)).

180. *Id.* at 23.

181. *Id.* at 104.

or in this case a regulatory prohibition, 'ma[kes] the licensed business less profitable than it had been prior to the new regulations.'"¹⁸² Further, the District Court observed that "[w]hen state law creates the privilege of holding a license to engage in a heavily regulated business like game farming in Montana, it need not pay compensation when it changes the conditions under which that privilege may be exercised."¹⁸³

The Court continues with an interesting discussion of intangible value, and notes that "[a]n expectation of profitability in a highly regulated field of business, where a license or permit is required for participation, is virtually never, in and of itself, considered a compensable property interest."¹⁸⁴

In an extensive analysis, the dissent raised parallel considerations not addressed in *Peanut Quota Holders* or *Minneapolis Taxi*. In a lengthy dissent, Justice Nelson argues that the Supreme Court uses a due process analysis, and notes that, in light of the discussion in *Lingle v. Chevron*¹⁸⁵ analysis would be more proper, looking to "whether the regulation is so onerous that its effect is tantamount to a direct appropriation or ouster."¹⁸⁶ The dissent argues that *Lingle* requires a "focus . . . on the severity of the burden . . . on private property rights."¹⁸⁷

The dissent claims that this is not a partial takings claim, since "none of the businesses in the industry can survive after I-143."¹⁸⁸ Interestingly, the dissent references *State v. Saugen*, a case that was explicitly distinguished in the taxi medallion case.¹⁸⁹

The game farm case illustrates the disadvantage of an ad hoc factual test, as the Court comes to a split decision. Both the majority and the dissent review Supreme Court precedent and ultimately come to distinctly differing decisions, and is one of the few cases that directly addressed the economic effect on a current license holder. The game farm case again looks to the effect of the government severely restricting a market however, and not the effect of a government allowing for increased access to the licensing system.

182. *Id.* at 19. The restriction of transferability is closer to the facts of *Boonstra* and *Melancon*. Regardless, the Court here ultimately denies the takings claim.

183. *Kafka*, 201 P.3d at 19.

184. *Id.* at 24.

185. In *Lingle*, the Supreme Court reviewed whether a compensable taking occurred with Hawaii's implementation of a rent-cap on oil companies. *Lingle v. Chevron*, 544 U.S. 528 (2005).

186. *Kafka*, 201 P.3d at 19 (Nelson, J., dissenting) (internal quotation marks omitted) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)).

187. *Id.* at 47.

188. *Id.* at 60.

189. *See id.* at 62.

The Montana Supreme Court notes that the purpose of the takings scholarship is to bar the “Government from forcing people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole.”¹⁹⁰ In the cases where a prior regulation has created a legacy system with a secondary market, such as taxi medallions, peanut quotas, and alcohol licenses, it is the governmental entities and the public who are bearing the burden of the restrictive system. The legacy license holders are benefitting from an advanced secondary market-based value derived solely from a legacy governmental program. There is little public justification to allow for any compensation for their secondary market investment.

E. *Relationship of Property to Value*

The dissent in the game farm cases highlights the unstated tension in the *Penn Central* analysis. The holdings in cases addressing the opening of markets rest on the analysis of the third consideration of *Penn Central*, and barely address the first two considerations. However, no court directly states that the third prong trumps the other two prongs, or that the factual test, in reality, gives no weight to the first two prongs, and, yet, courts have yet to state that the third prong, governmental ability to change the regulatory structure, should trump the other two factors. When the government restricts transferability, the courts address the *Penn Central*'s first two factors; those of the economic effects on the petitioner. Such a tension may create continued inconsistencies as courts address regulatory cases.

In considering whether a taking can be claimed in future cases, an examination of the property rights in comparison to the question of value or valuation may be illustrative.¹⁹¹ The property value may be the assumptive dollar amount that an owner requires to transfer the property (fair market value; a willing owner and willing buyer). In the instance of a license in a legacy system such as an alcohol quota license, consideration should also be given to the long standing legal proposition that a business owner has no right to the continued patronage of customers.¹⁹² Further, while freedom from more than typical disruption of a business may be valuable, it does not rise to the

190. *Id.* at 30.

191. This Article does not address the methods or concepts behind remedies in a regulatory takings scenario, which, of course, would involve determining a fair market value for the property that is the subject of the taking.

192. See STEVEN J. EAGLE, REGULATORY TAKINGS § 1-7(e) (5th ed. 2012) (citing Y.B. 11 H.IV 47 (1410) (anonymous note of case in which school master held to have no cause of action against new school teacher who lures away his students to a new school) (described in *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (Q.B. 1707))).

level of property.¹⁹³ The Supreme Court in *Reichelderfer v. Quinn* notes "the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its actions may be."¹⁹⁴

John Echeverria, in Chapter 9 of *Taking Sides on Takings Issues*, analyzes an alternative economic concept behind the partial takings claim. He notes two distinct considerations for considering valuation of a partial taking, first noting that one can look at the "proportion of the market value or use rights retained under the challenged regulatory regime."¹⁹⁵ Alternatively, he notes that one can look at the initial or original investment of a claimant and compare that value to the market value of the property subject to the regulatory restrictions.¹⁹⁶ Under either analysis, a licensee in a legacy system is likely to have no claim of economic impact¹⁹⁷ that would rise to the level of a Fifth Amendment takings claim. Echeverria provides a practical consideration for this holding and notes that

[i]n a typical taking case, the unregulated value of the property is estimated based on the market value the property would have if the challenged regulation were lifted for the owner's property. This approach plainly overestimates the market value of the property because it gives the owner the benefit of not having to comply with the regulation while simultaneously crediting him with the economic benefit of some or all of his neighbor's compliance with the same regulation."¹⁹⁸

He notes that litigators and judges then typically compare "between the property's market value if unregulated and its market value if regulated."¹⁹⁹

193. See *id.* at § 1-7(e) (citing *Keeble v. Hickeringill*, 103 Eng. Rep. 1127 (Q.B. 1707)) ("waterfowl netter must tolerate fair competition from neighboring property"). See also *Willis v. Univ. of N. Ala.*, 826 So. 2d 118, 121 (Ala. 2002) (construction of parking deck may decrease use of owner's property but does not rise to level of taking).

194. 287 U.S. 315, 319 (1932).

195. John D. Echeverria, *Do Partial Regulatory Takings Exist?*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 226 (Thomas E. Roberts ed., 2002).

196. See *id.*

197. For example, the taxi medallion owners argue diminution of value based not on loss of a \$500 license, but upon loss of exclusivity of the market. Licensees under an alcohol quota system may argue that the loss is not the use of the \$500 or \$1000 license, which those claimants still have and can use, but rather the loss of their relative position in the market. While this Article does not address the remedies and valuation methodologies if a takings claim were successful in a legacy license claim, there is little doubt that the exceedingly high valuation and high amount of funds at issue drive the underlying factual and legal analysis that Courts are considering in these types of cases.

198. Echeverria, *supra* note 195, at 245.

199. *Id.*

V. WHAT IS DIFFERENT ABOUT ALCOHOL REGULATION AND ON-PREMISE LIQUOR LICENSES?

As noted in the beginning of this Article, alcohol has been a critical commodity for the U.S. (like many intoxicants such as coffee, tea, tobacco and certain pharmaceuticals). Alcohol, however, is the only commodity in the U.S. subject to its own constitutional references, and, in fact, is the subject of the only Constitutional Amendment ever repealed, and finally (as noted by Constitutional scholar Lawrence Tribe) an individual's sole chance to violate the Constitution without resorting to owning a slave.²⁰⁰

The long history of alcohol as a commodity, and also its specific Constitutional framework provides that alcohol licensing has many legal, economic and public policy considerations to its licensing framework. As an intoxicant, the regulation of alcohol generally is subject to strict regulation and high taxes and fees. The specific Constitutional frameworks mean that sales of alcohol to a consumer are highly regulated from production/wholesale to the retailer to the consumer, and may be regulated on a federal, state or local level, creating a fragmented and byzantine system of regulation in the various states.

On-premise alcohol licensing is quite similar in its legal and economic framework to the concerns about regulating public safety for taxis and peanut quotas, with an added level of Constitutional consideration. When liquor control is involved, the Twenty-First Amendment confers "something more than the normal state authority over public health, welfare, and morals."²⁰¹ What drives this complex relationship that consumers and regulators have with the regulation of alcohol?

Along with the unique constitutional considerations, alcohol is an intoxicant, "acting on the central nervous system" and creating a distortion of "perception and emotional response."²⁰² Alcohol as an intoxicant is one of a spectrum of intoxicants from tea and coffee, tobacco, alcohol, marijuana and on to opiates. Alcohol, like many intoxicants, has a long history and has been part of human existence

200. See Lawrence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of the Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 220 (1995), for a discussion of the failings of the Twenty-First Amendment to the U.S. Constitution.

201. *City of Rancho Cucamonga v. Warner Consulting Servs.*, 262 Cal. Rptr. 349, 351 (Cal. Ct. App. 1989) (quoting *California v. LaRue*, 409 U.S. 109, 114 (1972)).

202. JAN-WILLEM GERRITSEN, *THE CONTROL OF FUDDLE AND FLASH: A SOCIOLOGICAL HISTORY OF REGULATION OF ALCOHOL AND OPIATES* 14 (S. Ishwaran ed. 2000).

since the Stone Age.²⁰³ It is, as well, subject to a number of public safety laws and regulations.

For purposes of this Article, the licensees who sell to the public, on-premise and by the glass, are regulated on the federal and state level, subject to background checks, and advertising restrictions. Law enforcement plays a large role in enforcement actions, especially in relation to under age drinking and drunk driving enforcement.

Licenses for on-premise alcohol service are set by political directive on a state or local level, though all on-premise licenses must be registered with the TTB. To hold a license, there must be an actual person responsible for the license itself, on the federal level and state level as there is a level of individual liability and public safety enforcement attached to the license.

Consumers have little interest in the archaic and complex licensing requirements. With changing consumer trends, health studies now indicate that the public can benefit from opening the licensing structure to allow more businesses to provide alcohol by the glass. Turning to the expansive studies on alcohol in relation to community health and regulatory structure, the majority of studies indicate that states that have fewer retail packaged spirits stores have significantly higher governmental revenues (taxes and costs associated with alcohol).²⁰⁴ Higher density of alcohol retail package locations is associated with higher rates of suicide, assault, and other violence.²⁰⁵

These studies typically review the middle tier of alcohol control, looking at consumer access to packaged liquors. The studies do not indicate any effects of increasing the number of locations that allow for sales of alcohol by the glass. Additionally, deregulation of the middle tier in Washington by citizens' initiative demonstrates the new push in the market to provide more access by the consumer.²⁰⁶ While the Washington deregulation was focused on the middle tier of the three-tier-tied house laws, it does demonstrate that expectation of alcohol accessibility is shifting, and legacy licensees should predict shifting of their license interests. Research within the last year has not

203. *Id.* at 24.

204. Marin Institute Report, *Control State Politics: Big Alcohol's Attempt to Dismantle Regulation State by State*, MARIN INSTITUTE 6 (Sept. 2010).

205. *Id.*

206. Citizens Initiatives to open up the regulatory structure in the liquor distribution process caused a massive shift in the Washington liquor market. Not only were Washington state jobs shifted out of the public sector, the prices of the liquor was extremely volatile for the first year of deregulation. The effects of Citizens Initiative 1183 are summarized in Pamela S. Erickson's report. See Erickson, *supra* note 28, at 6.

indicated that Washington is suffering from any increased public safety or health issues relating to deregulation of package liquor.²⁰⁷

Few studies however, address the retail consumption of alcohol by the glass. In this aspect, European data provides the most advanced research for on-premise consumption. Specifically, a significant study of Alcohol in Europe noted that

[g]enerally, the higher the level of alcohol consumption, the more serious is the crime or injury. The volume of alcohol consumption, the frequency of drinking and the frequency and volume of episodic heavy drinking all independently increase the risk of violence, with often, but not always, episodic heavy drinking mediating the impact of volume of consumption on harm.²⁰⁸

In other words, an individual's heavy drinking at a specific location is the statistically relevant concern. None of the studies reviewed here, or that the authors found, indicate that an increase in the number of places where an individual can access a glass of wine, a beer or even a martini with dinner will increase an individual's heavy drinking.

The European Union addresses alcohol access and risk policy through restrictive advertising bans, but struggles to address the conflicting needs of public health policy and its competing commercial and economic interests such as the wine industry of Europe.²⁰⁹

The European study provides some clarity when reviewing typical U.S. health studies. The National Institute of Alcohol Abuse and Alcoholism study entitled "Regulating Availability: How Access to Alcohol Affects Drinking and Problems in Youths and Adults" finds the following

four empirical generalizations[:] (1) whenever alcohol sales can be measured, greater outlet densities are directly related to use; (2) greater densities of bars and taverns and similar on-premise drinking places are directly related to assaults and violence; (3) greater densities of bars, taverns, and sometimes restaurants are directly related to drunken driving and alcohol related crashes; and (4) spatial effects in these analyses are large, require spatial statistical techniques for unbiased analysis, and suggest the presence of unmeasured correlated effects between geographic areas (i.e., the effects of outlet concentrations in one area have an impact on problems in another).²¹⁰

207. DISCUS Economic Contributions, *supra* note 4.

208. Peter Anderson & Ben Baumberg, *Alcohol in Europe a Public Health Perspective*, EUROPEAN COMMISSION 4 (June 2006), available at http://ec.europa.eu/health/archive/ph_determinants/life_style/alcohol/documents/alcohol_europe_en.pdf.

209. *Id.* at 8.

210. Gruenwald, *supra* note 53, at 251.

Again, the studies generally do not focus on the specificities of bars, restaurants and taverns, and whether there is any differentiation between increasing the number of restaurants and high-end alcohol by the glass locations, which provide significant economic benefits to jurisdictions by use of moderate sales of alcohols. When coupled with the notion that higher use of alcohol in a single instance dramatically increases the societal dangers, the notion of increased restaurants and locations with moderate sales of alcohol by the glass can increase economic benefits to a jurisdiction without unduly increasing societal dangers.

Further, recent health studies are now focusing on the benefits of alcohol in moderation. While alcohol is a drug of dependence and causes a number of diseases, European research also demonstrates that "a small dose of alcohol . . . reduces the risk of coronary heart disease."²¹¹ The U.S. dietary guidelines note that "moderate drinking can be a part of an adult healthy lifestyle," and the Center for Disease Control ("CDC") study indicates that moderate drinking can be one of four "key lifestyle behaviors to help people live longer."²¹² In even more controversial studies, there is some indication that moderate consumption over time may reduce risk of rheumatoid arthritis, an inflammatory disease.²¹³

As moderate consumption continues to popularize, and consumers have expectations of accessing alcoholic beverages, studies show that the relative dangers of alcohol may be decreasing, as underage drinking and binge drinking continue to steadily decline.²¹⁴ Even Washington State, where an initiative deregulated its three-tier system, is showing no increase in consumption of alcohol generally.²¹⁵

As consumers demand change to the archaic on-premise licensing systems, alcohol studies indicate growing benefits of moderate consumption, and studies further show that it is the concentrated consumption of alcohol that is problematic, public policy would benefit by opening up licensing to allow businesses to use a business model that can survive on moderate consumption and sale of alcohol. Under the current system, a new business has a high barrier and cost to enter the market and market forces will then require exceedingly high alcohol sales to cover the excessive cost of accessing a license, much less for a

211. Anderson & Baumberg, *supra* note 208, at 4.

212. DISCUS Economic Contributions, *supra* note 4, at 10.

213. See Henrik K  llberg et al., *Alcohol Consumption is Associated with Decreased Risk of Rheumatoid Arthritis: Results from Two Scandinavian Case-Control Studies*, NCBI (Feb. 2009), available at <http://www.ncbi.nlm.nih.gov/pubmed/18535114>.

214. DISCUS Economic Contributions, *supra* note 4, at 8.

215. See Erickson, *supra* note 28, at 18.

business to become profitable. Such a barrier to the market is not justified by public safety arguments, health arguments, or legal protective arguments, such as takings claims, made by current licensees.

While the differences in alcohol, its regulation and legal history are extensive, there is no indication that such differences would require or even indicate use of a different structure for a legal review of a regulatory change to a licensing system. Further, recent health studies do not indicate any additional concerns with opening up the on-premise alcohol licenses to new market participants.

VI. SUGGESTED POLICY CHANGES

Review of the current jurisprudence has demonstrated that opening the legacy markets to new participants will provide increased economic development, without adverse effects on public safety concerns. If a regulatory jurisdiction resists fully opening the markets, there are certain interim steps that a governmental entity might consider to appease the American consumer. Policy makers can use gradual regulatory change by increasing the number of licenses, without removing the quota system altogether. Such gradual opening of the legacy license system allows the market to self-correct, thus providing some license value stability for legacy license holders, while still providing increased access by entrepreneurs to the market. That increased access to the market will provide beneficial economic growth, satisfy consumers and will not negatively affect public health.

Many states have moved towards reform of liquor laws.²¹⁶ In Kentucky 2013, the Governor's Task Force on the Study of Kentucky's Alcoholic Beverage Control Laws released its report.²¹⁷ Within the report, the Task Force recommended consolidation of certain non-quota licenses that had begun to be created in the 1980s and allowed certain locations to serve alcohol to consumers outside the quota system, specifically for franchise development.²¹⁸ Those licenses now include hotels, restaurants, airports, and other non-quota on-premise style licenses.²¹⁹ The Task Force recommended combining all of the separate statutes into a single non-quota on-premise alcohol sales license.²²⁰ This type of license could be created or expanded in other

216. Michigan Governor's Task Force released its report in 2011 with the following commentary more clearly explaining the political controversy in the industry. Michale D. Lafaive, *Commentary: Recommendations for Gov. Snyder's Liquor Control Advisory Rules Committee*, MICH. CAPITOL CONFIDENTIAL (Oct. 25, 2011), <http://www.michigancapitolconfidential.com/15922>.

217. Governor's Task Force, *supra* note 10.

218. *Id.* at 52.

219. *Id.*

220. *Id.*

jurisdictions to allow new enterprises access to a license that functionally allows the same on-premise alcohol sales without disintegrating the current license system. For states such as Montana, where gambling is intrinsically tied to the alcohol quota system,²²¹ creating a new license type which is not tied to gambling licenses, and incorporates all of the current non-quota licenses such as service groups, restaurant beer and wine licenses and other similar licenses²²² would prevent claims relating to the devaluation of the quota license, or at least lessen the economic and legal effects on that legacy license.

Gradual increase of the number of licenses in a legacy system is, however, not necessary to have courts uphold a license system, but is merely a consideration for governmental regulators if the regulators wish to have slowed negative economic impact to current licensees, as well as slower change to the current system, and slower economic growth.

VII. CONCLUSION

The following is illustrative of consideration of opening a legacy licensing system to new participants: The *Peanut Quota Holder Court* noted

[t]o be sure, quota holders who transferred their quotas in the expectation that the benefits of the quota program would continue, in effect unchanged, lost the value of their quotas when the program was altered. But, the fact that quota holders expected to continue to derive benefits from the program does not create rights to compensation from the government. Therefore, as we view this case, the change in the quota program deprived the quota holder's property of value, but the government's conduct did not constitute a compensable taking of that property.²²³

While statutes and ordinances of differing states will affect the potential takings analysis, the considerations of property aspects articulated in the taxi medallion, peanut quotas and game farms provides a relevant framework to open legacy on-premise alcohol markets to new market participants, without creating a compensable²²⁴ takings claim.

221. MONT. CODE. ANN. § 23-5-119 (requiring only all-beverage license holders to offer gambling); MONT. CODE. ANN. § 16-4-201 (setting specific quotas for the number of all-beverage licenses in Montana).

222. See MONT. CODE. ANN. tit. 16 for Montana liquor laws, including various license types.

223. *Members of the Peanut Quota Holders Assoc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005).

224. If the effects of not recognizing a cognizable takings claim seems unduly harsh in liquor license cases, where a license may be devalued over time as the market is opened to other participants, consider the case of *Allied-General Nuclear Services v. United States*, 839 F.2d 1572

(Fed. Cir. 1988), where the government actively promoted and induced plaintiff's \$200 million expenditure to build a plutonium recycling plant and then the government refused to issue an operating permit.

